No. _____

SUPREME COURT OF THE UNITED STATES

Shantee MAHARAJ, individually
and as executrix of the estate of D. Dev MONGA
Petitioner

v.

Scott E. SOMMER, executor of the estate of Paul F. SOMMER; John C. OTTENBERG, Esq., receiver of D. Dev Monga, Core Environmental Resources, Inc., and Subsurface Technologies, Inc.; VANGUARD Fiduciary Trust Company; VANGUARD/MORGAN Growth Fund, Inc.; Dreyfus FOUNDERS Funds, Inc.; CITADEL Service Co., Inc.; and INVESTORS Fiduciary Trust Company
Respondents

PETITION FOR A WRIT OF CERTIORARI to the SUPREME JUDICIAL COURT for the COMMONWEALTH of MASSACHUSETTS

John G.S. Flym, Esq.
85 Bd Suchet, 75016 Paris, France
MA BBO # 172180
j.flym@neu.edu
+33 6 16 18 89 98

QUESTIONS PRESENTED

A. Due Process right to be heard[1]

May a state court deny a sole beneficiary surviving spouse the opportunity to contest the seizure of her IRAs[2] to pay her deceased husband's civil judgment debt, based on a posthumous penalty forfeiting the rights he had to the IRAs while alive?

B. Protected status of IRAs[3]

Does a state court violate federal law when, without evidence of fraudulent transfers into IRAs protected by federal and state statutes, it orders the seizure of those IRAs to pay a civil judgment debt[4]?

---

[1] Specially referring to *Degen v. United States*, 517 U.S. 820 (1996).

[2] Individual Retirement Accounts ("IRAs"). IRS *Publication 590*, Cat. No. 15160X, Chapter 1, Traditional IRAs page 35: "Surviving spouse. If you are a surviving spouse who is the sole beneficiary of your deceased spouse's IRA, you may elect to be treated as the owner and not as the beneficiary...." A sole beneficiary surviving wife becomes owner of her deceased husband's IRA without passing through his estate, *Fitzpatrick v. Small*, 29 Mass. *App.* Ct. 704, 707 (1991), *In re Estate of McIntosh*, 146 N.H. 474, 478 (N.H. 2001).

[3] Specially referring to *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), *Patterson v. Shumate*, 504 U.S. 753 (1992), and *Rousey v. Jacoway*, 544 U.S. 320 (2005).

[4] The order in question also directed payment from the IRAs of attorney fees requested by the IRA trustees. The question as presented to this Court also challenges the legality of that aspect of the order seizing Maharaj's IRAs.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Rules:

Miscellaneous:

OPINIONS AND ORDERS

A. Massachusetts

1. Middlesex Superior Court - Civ.A. 89-2851:

a. Following a jury trial in a civil action between two business associates, Paul F. Sommer ("Sommer") and D. Dev Monga ("Monga"), judgment entered on June 18, 1991 against Monga for $298,784.00 plus interest.

b. On June 15, 1992, while Monga's appeal of the 1991 judgment was pending, the Superior Court granted Sommer's motions for contempt against Monga, and for appointment of John C. Ottenberg ("Ottenberg") as receiver of Monga's estate. (*App.infra* 246). The Receiver immediately sought to seize Monga's IRAs, among other assets, to satisfy the judgment debt. The IRAs were in the custody of its Trustees, Vanguard[5] and Founders[6] ("IRA Trustees").

c. In its unreported September 29, 1995 order, the Superior Court purported to find Monga's Pennsylvania domiciliary "not credible", [Monga died

---

[5] Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc. (collectively "Vanguard"). Vanguard is a Pennsylvania resident and held one of Monga's IRA accounts in Pennsylvania.

[6] Founders Funds, Inc., and its IRA custodial agent Investors Fiduciary Trust Co. ("IFTC") (collectively "Founders"). IFTC is a Missouri resident and held another of Monga's IRA accounts in Missouri.

there from cancer within a year], and enjoined Monga and his Pennsylvania counsel from prosecuting any lawsuit against Ottenberg or Monga's IRA Trustees, including Monga's September 14, 1995 complaint for declaratory relief filed in Montgomery County, Pennsylvania on September 14, 1995 (*App.infra* 214).

d. In its June 2, 1995 opinion, *Ottenberg v. Vanguard Fiduciary Trust Co.*, 3 Mass. L. Rptr. 609, 1995 WL 809492, the Superior Court dismissed Ottenberg's Complaint for Contempt against the IRA Trustees, and denied Ottenberg's request for a preliminary injunction on condition that the IRA Trustees keep Monga's IRAs frozen until "...the determination of the validity of the [IRA] accounts...". (*App.infra* 10, 141).

e. In its unreported October 8, 1998 "*Memorandum of Decision and Orders on Pending Motions*", the Superior Court (i) ruled that Monga [who died in 1996] had forfeited his rights to the IRAs, (ii) ruled that Maharaj, (Monga's spouse & sole beneficiary), had no right to contest seizure of the IRAs to pay Monga's judgment debt, (iii) permanently enjoined Maharaj from suing the IRA Trustees in any state, federal or administrative forum concerning the IRAs, (iv) ordered the IRA Trustees to surrender the IRAs to Ottenberg, and (v) granted the IRA Trustees' request for legal fees from the IRA assets. (*App.infra* 133-155).

f. In its unreported August 1, 2000 decision, the Superior Court ordered distribution of the receivership estate's remaining assets, $214,750.54,

to Ottenberg, Sommer, Sommer's counsel Peter Brooks ("Brooks"), with additional fees to the IRA Trustees, and discharged Ottenberg.

2. Appeals Court:

a. No. 92-P-749. On January 13, 1994 in *Sommer v. Monga*, 35 Mass.*App.* Ct. 761, the Appeals Court ruled that Sommer's motion to dismiss Monga's appeal of the underlying 1991 judgment would be granted unless, within 60 days, Monga purged himself of the 1992 contempt; the appeal was thereafter dismissed. [Two weeks after the January 13 decision, Monga filed an appeal from the Superior Court's denial of his motion to set aside the contempt. Monga died in 1996 before this second appeal could be heard].

b. No. 2004-P-0591. In Maharaj's appeal regarding the receivership,[7] on March 3, 2006 the Appeals Court vacated the Superior Court's 1998 and 2000 orders which authorized seizure and distribution of the IRA assets. *Sommer v. Maharaj & Vanguard*, 65 Mass.App. Ct. 657 ("Appeals Court 2006 Decision") (*App.infra* 71).

3. Supreme Judicial Court ("SJC") - No. SJC-09855:

On June 13, 2008 opinion, the SJC vacated the Appeals Court 2006 Decision, reinstating the Superior Court's 1998 and 2000 orders. *Sommer v.*

---

[7] The Appeals Court's 1994 opinion concerned Monga's appeal of the 1991 judgment.

Maharaj & Vanguard, 451 Mass. 615, ("SJC 2008 Opinion"), (*App.infra* 35).

4. U.S. Supreme Court - No. 94-7375:

On February 21, 1995, this Court denied Monga's petition for a writ of certiorari to review the 1994 Massachusetts court opinion dismissing his appeal from the underlying judgment, *Monga v. Sommer*, 513 U.S. 1169. (*App.infra* 58)

B. Pennsylvania

1. Court of Common Pleas, Montgomery County - Civ.A. No. 95-17717

Monga filed a complaint seeking declaratory relief concerning his IRAs on September 22, 1995. The Court of Common Pleas, Montgomery County, Pennsylvania, Tressler, J., issued an order directing the IRA Trustees to place Monga's IRAs in *custodia legis*, "...pending a determination of whether said funds are exempt from execution and attachment in satisfaction of an outstanding judgment in Massachusetts...." (*App.infra* 200-202). On October 18, 1995, Ottenberg removed the case to federal court.

2. Federal Courts

a. Eastern District of Pennsylvania

i. Civ. A. 95-6637, *Monga v. Ottenberg*

Upon its removal to federal court, Monga's Court of Common Pleas complaint was dismissed in an unreported April 19, 1996 decision. The court held that it lacked personal jurisdiction over Ottenberg because he had not sought to domesticate his Massachusetts judgment, "...consistent with the Full Faith and Credit Clause...." As a matter of comity between Pennsylvania and Massachusetts, Judge Giles also dismissed the case against the IRA Trustees, observing:

> Moreover, should the Massachusetts court order become final, and remain adverse to the Funds, the Funds could file an action in federal court in Pennsylvania seeking a declaratory judgment as to the ownership of the monies. A Massachusetts order requiring the release of the monies to Mr. Ottenberg would not insulate the Funds from an action for damages by Mr. Monga. (*App.infra* 171).

Indeed, as Superior Court Judge Lenk's 1995 opinion reports, under Ottenberg's threats of filing contempt proceedings,

> ... Founders Funds stated that it and Citadel would turn over the accounts if the court entered an order delineating certain procedures to facilitate the transfer. On December 16, 1994, this court issued the order. ... [N]either Founders Funds nor Citadel have turned over the accounts.
>
> 3 Mass.L.Rptr. 609, n5

Ottenberg did not pursue Founders' refusal to obey Lenk's December 16, 1994 order.

ii. Civ. A. 95-5235, *Monga v. Ottenberg*, 1996 WL 325896

In its June 11, 1996 "Memorandum and Order" dismissing as to Ottenberg, (Monga's complaint sought declaratory relief, damages for tortious interference with contract, abuse of process, breach of contract, breach of the duty of good faith and fair dealing, and conversion), Judge Hutton ruled that issue preclusion barred reconsidering the court's jurisdiction over Ottenberg, noting that Ottenberg had made no effort to register the judgment in Pennsylvania or to obtain a writ of execution.

iii. Civ. A. 95-5235, *Monga v. Ottenberg*, 2001 WL 253648

In his March 1, 2000 "Memorandum and Order" granting the IRA Trustees' FRCP Rule 12(b)(6) motion to dismiss, Judge Hutton wrote:

> In March of 1996, Monga was diagnosed with cancer. As a result of Monga's illness, all proceedings in the instant action were stayed and this case was placed in the Suspense Docket on June 13, 1996. See Order entered June 13, 1996. Monga died on August 23, 1996. Since then, his widow and the executrix of his estate, Shantee Maharaj ("Maharaj"), has pursued the Massachusetts litigation.
>
> ...
>
> Ms. Maharaj has been "permanently enjoined" by the Massachusetts Superior Court "from instituting or prosecuting against Vanguard, IFTC, or any of them, any proceeding in any state

> or United States court or administrative tribunal regarding the Monga IRA Accounts." See Memorandum of Decision and Orders on Pending Motions, October 8, 1998, at 19. Also, in that same Order of the Massachusetts Superior Court, Ms. Maharaj was "permanently enjoined from instituting or prosecuting against Founders Funds, Inc., any proceeding in any state or United States court or administrative tribunal regarding the Monga IRA Accounts." (*App.infra* 149-150).

b. U.S. Court of Appeals for the Third Circuit - No. 01-1827

On July 30, 2002, a panel of the Third Circuit issued a *per curiam* opinion in *Monga v. Ottenberg, et al.*, N° 01-1827, 43 Fed.Appx. 523, affirming the lower court's decision to dismiss CA 95-5235, on the basis of issue preclusion:

> The issue of ownership of the IRAs was specifically determined by the Massachusetts court, and the determination resulted in a final[8], valid judgment. Monga was a party to the prior litigation and had a full and fair opportunity[9] to litigate the issue of whether and to what extent the IRAs were subject to the claims of Monga's creditors. Maharaj is, therefore, barred by the doctrine of issue

---

[8] The allegedly final judgment was set aside by the Massachusetts Appeals Court in 2006.

[9] Neither Monga nor Maharaj were accorded that opportunity in Massachusetts, and his efforts to litigate in Pennsylvania "...the issue of whether and to what extent the IRAs were subject to the claims of Monga's creditors..." ended with the Third Circuit's decision and judgment.

preclusion from arguing in this action that she has any right to the IRAs or that the IRAs are not subject to the claims of Monga's creditors. (*App.infra* 120).

The Third Circuit's 2002 opinion was recalled and vacated on January 12, 2004. A new panel issued a nearly identical opinion on April 7, 2004, without a hearing, 95 Fed.Appx. 463.

c. U.S. Supreme Court - Nos. 02-1210 and 04-7682

On April 28, 2003, this Court denied Maharaj's petition for a writ of certiorari to review the Third Circuit's 2002 decision, *Maharaj v. Ottenberg*, 538 U.S. 998. On February 22, 2005 it denied Maharaj's petition for a writ of certiorari to review the Third Circuit's 2004 decision, *Maharaj v. Ottenberg*, 543 U.S. 1163.

JURISDICTION

On June 13, 2008, the Supreme Judicial Court of Massachusetts issued the opinion which Maharaj seeks to have this Court review on writ of certiorari. (*App.infra* 25-37).

On September 8, 2008, the Supreme Judicial Court denied Maharaj's petition for rehearing. (*App.infra* 1-2).

On December 8, 2008, Justice Souter granted Maharaj's Application No. 08A495 for an extension until February 5, 2009 to file the instant petition.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a):

> Final judgments ... by the highest court of a State ... may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ... or statutes of ... the United States.

CONSTITUTIONAL PROVISIONS

Article 6, ¶ 2 provides in part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof;... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Amendment 14, ¶ 1 provides in part:

> ...nor shall any State deprive any person of ... property, without due process of law;...

STATUTORY PROVISIONS

Internal Revenue Code, 26 U.S.C. § 408 provides in part:

> (a) Individual retirement account.-- For purposes of this section, the term "individual retirement account" means a Trust created or organized in the United States for the exclusive benefit of an

individual or his beneficiaries, but only if ...the trust meets the following requirements:

...

(4) The interest of an individual in the balance in his account is nonforfeitable.

...

(d) Tax treatment of distributions.--

...

(3) Rollover contribution.--

...

(C) Denial of rollover treatment for inherited accounts, etc.--

...

(ii) Inherited individual retirement account or annuity.--An individual retirement account or individual retirement annuity shall be treated as inherited if--

...

(II) such individual was not the surviving spouse of such other individual.

Bankruptcy Code, 11 U.S.C.A. § 522 provides in part:

§ 522. Exemptions

...

(d) The following property may be exempted under subsection (b)(2) of this section:

...

(10) The debtor's right to receive--

...

(E) a payment under a stock bonus, pension, profitsharing, annuity, or

> similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--
>
> ...
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.
>
> ...
>
> (n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986...the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions ... and earnings thereon, shall not exceed $1,095,000 ...[10]

Massachusetts, M.G.L. Ch. 235 § 34A provides in part:

> The right or interest of any person in ... an Individual Retirement Account ... shall not be attached or taken on execution or other process to satisfy any debt or liability of such person...

Missouri, Mo. Ann. Stat. § 513.430(10)(f) provides in part:

---

[10] This subsection was recently added by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

> ...[t]he following property shall be exempt from attachment and execution to the extent of any person's interest therein:
> ...
> ...any interest of any participant or beneficiary in a retirement plan which is qualified under section...408...of the Internal Revenue Code...

Pennsylvania, 42 Pa. C.S.A. § 8124(b)(1) provides in part:

> ...the following money or other property of the judgment debtor shall be exempt from attachment or execution on a judgment:
>
> Any retirement or annuity fund provided for under...section 408...of the Internal Revenue Code.

STATEMENT OF THE CASE

A. Facts material to consideration of the questions presented

1. The Monga IRAs

Monga was Chief Petroleum Engineer at Northeast Petroleum ("Northeast") from 1974 to 1986. He married Maharaj in early 1986, resigned from Northeast, and started his company, Monga Resources. All contributions to Monga's IRAs came from Northeast's qualified pension plan. $35,688.19 had accumulated in Monga's Scudder IRA by the time he met Sommer in 1986. By June 26, 1991, that IRA had grown to $56,682.54, without any new

contributions.[11] The Scudder IRA was rolled over into the Vanguard and Founders IRAs which, after the June 15, 1992 receivership order, became the object of an 8 years long tug-of-war between Ottenberg and the IRA Trustees. (*App.infra* 246-250).

An August 20, 1992 Superior Court order states:

---

[11] At the time the Superior Court issued its October 8, 1998 order, the uncontroverted record evidence showed:

History of Monga's IRAs

Date	Source	Amount
9/23/83	Employer Distribution Scudder IRA	$3,091.51
6/22/85	Rollover From Charter Co. Profit Sharing Plan to Bank of Boston	$36,823.66
11/18/85	Direct Transfer from Bank of Boston to the Scudder IRA	$30,000.00
1/24/86	Lump Sum Retirement Benefit from Charter Co. to Scudder IRA	$2,596.68
	*******	
6/26/91	Value of Scudder IRA by Growth	$56.682.54
6/26/91	Scudder IRA closed with	$56,682.54
8/20/91	Rollover IRA established at Founders with Scudder IRA funds	$56,682.54
10/7/91	Direct transfer from Founders IRA to Vanguard IRA	$40,000.00

See *Appeals Court and SJC App.* 616-623, 642-665, 871-78, 971, 999A-999SS.

> The Vanguard Morgan Growth Fund is ordered to turn over to the receiver all of the funds in account no. 987607647, standing in the name of Dharam D. Monga, IRA....[12]

In response, on October 5, 1992 The Vanguard Group Associate Counsel Suzanne F. Barton wrote to Ottenberg:

> ...[W]e have determined that it will be necessary for you to obtain an order from a Pennsylvania court of appropriate jurisdiction before we comply with your request to transfer the Monga IRA to Fleet Bank.
>
> I have enclosed a copy of the Vanguard Individual Retirement Custodial Account Agreement (the "Agreement"), pursuant to which Vanguard Fiduciary Trust Company serves as custodian of the Monga IRA. Article 8.4 of the Agreement provides that the Monga IRA shall be governed by Pennsylvania law. As you may be aware, Pennsylvania law generally prohibits attachment of IRA assets.[13] (*App.infra* 223-225).

---

[12] Superior Court Docket item # ("*Dkt*") 206

[13] Copies were sent to Vanguard General Counsel R.J. Kaplinsky and to Monga's Pennsylvania attorney, Thomas D. Rees, of Norristown. On October 1, 1992 Ms. Barton had also written Mr. Rees, "As promised, I have reviewed the Monga situation with Raymond J. Klapinsky, Vanguard's General Counsel. Under the circumstances, Mr. Klapinsky has determined that Vanguard will not transfer Mr. Monga's IRA to Fleet Bank in Massachusetts without an order from a Pennsylvania court of proper jurisdiction." (*App.infra* 222). On June 30, 1994 Vanguard Assistant General Counsel Paul F. Gallagher wrote to Ottenberg:

In 1994, Ottenberg filed a Complaint for contempt against the IRA Trustees. They responded by moving to dismiss (*Dkt.* 291). Vanguard and IFTC's joint memorandum argued:

> In reviewing our file I have not come across anything that would cause us to change the position that was set forth in Ms. Barton's correspondence to you of October 5, 1992. ... Accordingly, we must decline your request to transfer the assets to you.
>
> ... we can only take such action if we are ordered to do so by a Pennsylvania court ....

Barton's 12/1/94 Affidavit explains:

> ... On June 19, 1992, I received a copy of [an] order appointing John C. Ottenberg as Receiver of D. Dev Monga... The Receiver requested that Vanguard freeze Monga's [IRA] account and 'forward the funds' to the Receiver. On June 24, 1992, Vanguard froze the [IRA] account.
>
> ... [A]s counsel to Vanguard, I have been involved in several disputes in which parties have attempted to attach or otherwise assert control over a shareholder's shares in various mutual funds managed by Vanguard Group, Inc., including Vanguard Fund. In each case, the party asserting control of the shares has "domesticated" its claim by obtaining an appropriate judgment in an out of state court, and then requesting that the court of Pennsylvania execute on that out of state judgment pursuant to 42 Pa. C.S.A. Sec. 4306 *et. seq.* No party has ever asserted that Vanguard must turn over control over mutual funds shares based on an out of state court order.
>
> Since October 1992, other counsel for Vanguard and I have repeatedly encouraged the Receiver to domesticate his Massachusetts judgment by bringing it to the Pennsylvania courts for enforcement.... (*App.infra* 105)

Ottenberg's refusal to domesticate the Massachusetts order in Pennsylvania speaks for itself.

> ... At the heart of this action is the issue of whether Ottenberg is entitled to proceed against assets held in Individual Retirement Accounts ("IRAs") currently frozen in mutual fund accounts for the benefit of D. Dev Monga ....
>
> ... the Court [should] require Ottenberg to prove that the IRAs are invalid and can be reached by him, as that determination will be dispositive of all other issues in this case. If Ottenberg cannot prove that the IRAs were fraudulently established or funded, then Ottenberg has no right to proceed against the assets in any forum and this matter must be dismissed ....
>
> *Dkt.* 291 (emphasis added).

Founders, Monga's other IRA Trustee similarly argued:

> ... In the Receiver's Memorandum, the Receiver for the first time concedes that he is not entitled to reach the funds invested in Founders Funds in IRA accounts in the name of D. Dev Monga if the accounts are valid IRAs. The Receiver admits that valid IRA accounts are "exempt" from claims of creditors of Mr. Monga
>
> ...
>
> ...The only basis provided by the Receiver for its claim that these accounts are not valid IRA accounts is the allegation that the amount of funds in said IRA accounts "is extremely high for someone of Mr. Monga's age." Substitute Complaint, Count XI. Founders Funds should not be required to turn over funds or further defend

> this action based upon such a vague and unsupported allegation ....
>
> *Dkt.* 299 (emphasis added).

On June 5, 1995 Judge Lenk dismissed Ottenberg's complaint that the IRA Trustees be found in contempt for refusing to surrender Monga's IRAs as ordered at various times since 1992. Ottenberg persisted through 1998 in his efforts to secure compliance from the IRA Trustees, but he failed to produce any evidence that the IRAs' were invalid. *Dkt.* 319, 320, (*App.infra* 174-192).

Monga died in 1996. When the Superior Court issued its October 8, 1998 decision, the record evidence showed that the IRAs were funded more than 5 years before the 1991 judgment against Monga. (*E.g., See n.11 infra*). In his 2006 Appeals Court argument, Vanguard's counsel, Mr. Baraniak candidly answered Judge Graham's question: in the 16 years which had elapsed since the 1992 orders directing the IRA Trustees to surrender Monga's IRAs, no evidence had ever been presented to question their validity.[14]

Plainly, Ottenberg had no such evidence. In fact, the record evidence shows that Ottenberg knew the source of Monga's IRAs[15]. In 1998, two years after

---

[14] At minute 20 of the Appeals Court October 14, 2005 oral argument audio transcript:

> Judge Graham: Did you get any evidence whatsoever that [the IRAs] were fraudulently set up?
>
> Baraniak: Not that I am aware of your honor.

[15] Paragraphs "b" and "g" of Cathy Brooks' June 10, 1992 affidavit, submitted by her husband Peter Brooks in support of

Monga's death, Ottenberg invented a new theory: simply declare that Monga had forfeited his rights to a judicial determination of the IRAs' validity, and thereby his rights to the IRAs. This idea worked. The Superior Court issued its posthumous declaration of forfeiture, the IRA Trustees turned the IRAs over to Ottenberg, and the receivership got neatly wrapped up. The Superior Court allowed Ottenberg to leave almost no trace (apart from court papers) of what he had done or learned over the prior 8 years of his receivership. Ottenberg and the IRA Trustees were both awarded a large chunk of Monga's IRA assets as attorney fees. Only the widow, acting *pro se* against a battery of Boston's and Philadelphia's finest lawyers, was left with something to complain about: her IRAs had been taken, and the Superior Court had refused

---

the receivership motion, detail the rollovers of the IRAs from Scudder into Founders and Vanguard. Moreover, the pleadings in the Superior court show that, "During pretrial discovery in 1990, and postrial discovery in 1991, Monga provided Sommer and his attorneys with copies of all of his personal tax records for the previous ten years, in addition to all of the tax records of the corporate Defendants Core and Subsurface since their inception. Subsequently in 1992, during unannounced raids on Monga's offices and home, all of Monga's personal and corporate documents were seized by Sommer, his attorneys Mr. & Mrs. Brooks, and Ottenberg, [and they have remained] in the exclusive possession of Sommer, his attorneys and Ottenberg. ... Ottenberg has submitted invoices showing monthly storage charges for storing boxes of documents confiscated from Monga, Core and Subsurface." Maharaj *Appeals Court & SJC App.*, 612, n1; Ottenberg and Sommer's *Appeals Court & SJC App.* , 43, 45, 93, 105, 137-139, 206 208, 212, 241, 330, 331, 337, 360, 361. Nevertheless, paragraph 9 of Ottenberg's July 10, 1998 Affidavit claims, "It does not appear to be possible to determine from these records the source of the monies deposited into the Founders accounts." *Appeals Court & SJC App.* 579 581

to hear Maharaj as to why its 1998 and 2000 orders were illegal.

2. Findings as to Monga's conduct

Monga's alleged misconduct is the basis of the SJC 2008 Opinion reversing the March 3, 2006 Appeals Court's decision which remanded the case to Superior Court for a determination of the IRAs' validity. The SJC's rationale is that Monga's misconduct was so extreme as to warrant the Superior Court's extreme sanction of denying Maharaj the right to be heard concerning the IRAs' validity and the legality of a posthumous declaration that Monga had forfeited his IRAs.

The SJC opinion's rhetoric underscores its inability to cite explicit misconduct findings in the record. Aside from vague references to prior lower court opinions which, when examined, suffer from the same lack of precision, the SJC 2008 Opinion identifies only two sources for its characterization of Monga's conduct: 1. An affidavit submitted by Cathy Brooks in support of Sommer's receivership motion; and 2. the contempt "finding" issued simultaneously with the 1992 order appointing Ottenberg.

a. The Cathy Brooks affidavit

On June 10, 1992 Attorney Cathy Brooks filed an Affidavit in support of Sommer's receivership motion. Paragraph 3 expressly refers to an order issued on June 12, 1991, (after the June 7, 1991 verdict for

Sommer), enjoining property transfers except in the normal course of Monga's business.[16] (*App.infra* 253)

The title of the affidavit's first section is, "*I. Fraudulent Conveyance of Real Estate,*" and its five numbered paragraphs describe nine transactions, all of which are dated as having occurred in 1990, predating the 1991 injunction by a year.[17] While Brooks' affidavit contains argumentative conclusions based on various attached exhibits, no evidentiary finding was made of fraudulent transfers. Nevertheless, on June 15, 1992 the Superior Court endorsed "granted" on the order drafted by Brooks which, in ¶ 4) on p.2 recites a "finding" that "... Monga has fraudulently conveyed his real and personal property to one or more third parties."[18]

---

[16] On June 12, 1991, (five days after the jury's June 7 verdict, six days before the June 18 entry of judgment, Dkt. 105-109), the trial court endorsed an order permanently enjoining Monga from transferring assets "... other than in the ordinary and usual course of business," ¶ intro. Paragraph numbered 3 of this June 12 order added: "The injunction will not unduly interfere with the personal or business activities of the defendants, as the injunction only would prohibit the bulk or unusual transfer of assets and would not interfere with the defendants' ability to continue in business...." The order purports to avoid undue interfere with Monga's ability to conduct his business.

[17] (¶ 4) August 21, 1990; (¶ 5) August 21, 1990; (¶ 6) August 31, 1990, September 26, 1990, September 27, 1990, and September 29, 1990; (¶ 7) September 10, 1990 and October 31, 1990; and (¶ 8) October 31, 1990.

[18] The dubiousness of the unsubstantiated allegations of fraudulent transfers is underlined by Monga's March 13, 1995 motion for leave to proceed *in forma pauperis*, (on appeal from the denial of his motion to purge the contempt charge), *Dkt.* 300. Sommer had 10 days to respond. *Id.* On April 3, 1995 Monga's *in forma pauperis* motion was allowed. The allegations

b. The Superior Court's contempt finding

The Superior Court entered a default contempt against Monga on June 15, 1992.[19] A comparison of the various Massachusetts courts' opinions, (Superior, Appeals as well as SJC), reveals important differences in the characterization of that entry, but those need not be resolved for purposes of this Court's review the SJC 2008 Opinion. However, a few related points should be addressed.

i. The dismissal of Monga's appeal

The Appeals Court's 1994 opinion conditionally dismissed Monga's appeal of the 1991 judgment: it gave Monga a brief period within which to purge his contempt, in which case Sommer's motion to dismiss Monga's appeal would be denied. The Appeals Court candidly notes that the issues raised by Monga's lawyer in the briefs were substantial. *Sommer v. Monga*, 35 Mass.App.Ct. 761, 765 (1994).

Indeed, the central issue in Monga's appeal concerned the trial judge's directed verdict on Monga's counterclaim for Sommer's breach of fiduciary duties. Sommer held a 1/3 share interest in Core Environmental Technologies Inc. ("Core") and "Subsurface Technologies Inc. ("SST"). Monga's

---

of fraud are also undercut by the fact that, after Monga died in 1996, his widow Maharaj was forced to litigate *pro se*, (she had never practiced law). Since Monga's death, she has largely depended on the charity of friends.

[19] "Motion (P #176) allowed, defts. Failed to appear. (Izzo,J)". *Dkt.* 181."

counterclaim alleged, and Sommer conceded, that while still an officer and shareholder of Core and SST, Sommer started a competing business in 1989, "Sommer Environmental Technologies, Inc.", with offices a few miles from Core and SST in an adjoining town.[20] Moreover, Sommer had taken half of Core and SST's employees, and also Monga's client lists and other confidential information. In short, the jury never heard that Sommer had set up a competing shop by raiding Monga's companies before deciding to triple the amount Sommer was entitled to receive under his buy-out contract with Monga. The trial judge who dismissed Monga's counterclaim was also the one who entered the 1992 default contempt against Monga and granted Sommer's *ex parte motion* to appoint the receiver.[21]

ii. Monga's efforts to purge the contempt finding

Monga's numerous attempts to have the default contempt removed began almost immediately and continued until he died.[22] On June 3, 1994, the

---

[20] The basis for such a breach of fiduciary counterclaim is well established in Massachusetts jurisprudence. See e.g. *Cain v. Cain*, 3 Mass. *App.* Ct. 467 (1975).

[21] Neither Sommer's motion to appoint a receiver nor his contempt pleadings were served "in hand" as required by statute. *Dkt.* 181.

[22] See e.g. Superior Court docket entries on 06/23/93, 08/03/93, 08/19/93, 11/04/93, 12/31/93, ## 237, 240, 244.1, 245. On February 1, 1994, two weeks before the Appeals Court rescript, Monga appealed the Superior Court's denial of his motions to set aside the contempt. After the rescript, on May 2, 1994, Monga requested instructions for purging the contempt. *Dkt.* 250.

Superior Court declared the judgment final. *Dkt.*# 257. On September 20, 1994, Monga filed his notice of appeal and moved that the record be assembled. *Dkt.* 272, 273. As noted above, Monga's motion to proceed with this appeal *in forma pauperis* was allowed on April 3, 1995, *Dkt.* 300. Monga died before this appeal could be heard. Entry 09/12/96, *Dkt.* 357. What the Appeals Court might have decided concerning the Superior Court's refusal to remove the default contempt, or the dismissal of Monga's appeal of the judgment, is unknowable.

iii. The penalty imposed on Monga for the contempt finding

The June 3, 1994 Superior Court order pronouncing the finality of the contempt judgment did not merely order its execution - resulting in dismissal of Monga's appeal. It also imposed a $100,000 "... penalty assessed by this Court in connection with the plaintiff's previous motion and complaint for contempt ...," (emphasis added), *Dkt.* 257. The evident question raised by the appeal dismissal and this penalty is whether it was lawful in 1998 for the Superior Court to recycle the same contempt judgment posthumously adding forfeiture of Monga's IRAs as a third, final penalty.

iv. The dissolution of Monga's companies

The docket shows that Monga's record for appeal of the 1991 verdict was completed just before the 1992 receivership order. At that time, it was far from

evident that Sommer would prevail on the merits of this appeal.

The order dated July 8, 1992 *Dkt.* 192,[23] provides in paragraph numbered 3, "... the receiver is hereby ordered ... to conserve and manage the assets of the defendants and EnviroTech,[24] and all of Core's and Subsurface's subsidiaries and to operate the defendants' respective businesses ...." Ottenberg seized Monga's companies and home two days after his June 15 appointment as Receiver. In 2006, answering Appeals Court Judge Graham's question, Brooks stated that in 1989, "... the companies were healthy, prospering and growing rapidly...."[25] Although the muti-million dollar attachments against Monga[26] and litigious discovery proceedings

---

[23] As noted above, the initial June 15, 1992 "Order for Appointment of Receiver," *Dkt.* 182, was supplanted by a new order dated July 8, 1992, *Dkt.* 192, authorizing the seizure of EnviroTech.

[24] Jack A. Crichton submitted an affidavit on July 13, 1992 in Civ.A. 89-2951, stating in part that he had 50 years of consulting and management experience in the petroleum-engineering geology field, that he had started EnviroTech in 1991, that he was its sole shareholder, Director, Treasurer and Clerk, that he had hired Monga to be its Manager "...[B]ecause I was familiar with Dev Monga's outstanding professional reputation as an environmental specialist...." Crichton added, "...I understand that on Tuesday, June 16, 1992, the plaintiff Paul F. Sommer and his attorneys appeared at EnviroTech's office unannounced, and in Mr. Monga's absence, illegally searched and seized proprietary client information, files, financial records, and computer data of my company. ... It appears that Mr. Sommer is attempting to put EnviroTech out of business ..." *App.* 230-234.

[25] At minute 21 of the Appeals Court argument audio recording.

[26] $3.7 million: On June 12, 1991 the Superior Court ordered attachments of $500,000, $500,000, $700,000 and $700,000 respectively,

must have taken their toll in the year which had elapsed since the jury's 1991 verdict, Ottenberg's July 14, 1992 report states that the three companies he seized were in business, that Subsurface had assets exceeding its debts and leased out a drilling rig which it owned; that, "EnviroTech was actively and substantially engaged in the environmental consulting and testing business, with substantial clients and apparently a substantial volume of business," and that Core provided personnel, equipment and facilities to EnviroTech. *Dkt.* 192.5, ¶¶ 8-12.

Ottenberg report recommended liquidation of the companies despite their solvency and his receivership mandate, claiming their "...business credibility is obviously damaged by the fact of the Receivership...." He added that the companies would be deemed insolvent if the 1991 judgment, (although the record for its appeal had just been completed), was counted among the companies' debts. *Dkt.* 192.5, ¶ 14. Ottenberg asked for authority to fire the companies' employees and to liquidate Core, Subsurface and EnviroTech. *Dkt.* 192.5, pp. 3-4. The trial court allowed the receiver's ex parte requests by endorsement in the report's margin. Liquidating the companies for pennies on the dollar did nothing to serve the putative aim of satisfying the judgment

---

Dkt. 97, 98, 99, 100, 117 (items 2 & 3). Other trustee process attachments were subsequent ordered: on August 13, 1991 $700,000, *Dkt.* 123, and a bank account, *Dkt.* 124; September 19, 1991, another bank account, *Dkt.* 128, and a $500,000 attachment, *Dkt.* 129 - (these entries are in the handwritten part of the docket sheet); December 19, 1991, " $100,000 each," *Dkt.* 147, 148.

debt. It did, however, eliminate Sommer's foremost local competition for his (and Monga's) clientele.[27]

3. Findings as to Maharaj's conduct

Among the more disturbing aspects of the SJC 2008 Opinion is the facile manner in which it seeks to attribute Monga's alleged misconduct to Maharaj. Hopefully, the day is long past when a husband's sins could be visited on his wife.

The fact is that, apart from occasional assertions of misconduct leveled at Maharaj, the record is barren of any specific findings against her. Indeed, the record shows that Ottenberg filed a number of contempt complaints against Monga as well as against Maharaj, but he withdrew them all. The only contempt finding in the record is the one in 1992 against Monga at Sommer's *ex parte* initiative. It bears noting that the Superior court's refusal to set aside the 1992 contempt was the object of an appeal at the time Monga died.

As this 1992 default contempt illustrates, the Superior Court was quite able and willing to enter default orders based on *ex parte* motions, and the most plausible explanation for Ottenberg's repeated dismissals of his own motions and complaints for contempt, against Monga and Maharaj, is that he wanted to avoid the procedural strictures of Mass.R.Civ.P. 65.3(a)(3), including the possibility of

---

[27] Sommer's Corporate Annual Report filed with the Commonwealth of Massachusetts Secretary on February 25, 1998 shows that his attorney, Peter S. Brooks was an officer of Sommer's company. *Appls Ct & SJC App*'x p. 951.

appellate review in the event of a contempt judgment. It is a matter of speculation whether the Superior Court might have found Maharaj in contempt had Ottenberg prosecuted any such request.

In short, Ottenberg's 1998 *ex machina* solution, (to his dilemma of lacking factual evidence to support his legal position), was to sidestep both the statutory rules of civil procedure by invoking as a substitute the Superior Court's "inherent powers". Down this road lies the end of the rule of law, and the specter of naked judicial power's anarchy.

B. Stage in the proceedings when the federal questions were raised

In the Superior Court, Maharaj asserted her federally protected rights to the IRAs, which became her property after Monga's death. She elected to treat Monga's IRAs as her own as provided for under federal law, see e.g. IRS Pub. 590, Section 2, and immediately advised the IRA Trustees.

Thus, on July 20, 1998 Maharaj moved to Dismiss Ottenberg's Amended Substitute Complaint to Effect Turnover of Accounts, and opposed Ottenberg's Motion for Sanctions and/or Summary Judgment," *Dkt.* 405, *Appls Ct & SJC App.* 591-593. Maharaj's Memorandum of law, *Dkt.* 409, *Appls Ct & SJC App.* 608-668, maintained that, upon Monga's death, the IRAs became her property, and that the IRA Accounts were exempt from attachment in payment

of a judgment debt. *Appeals Court & SJC App.* 615.[28] Maharaj also filed a "Request for Hearing", *Id* at 590, *Dkt.* 406. On 10/8/98 the Superior Court entered its forfeiture order, *Dkt* 448, and on August 1, 2000 its order terminating the receivership. *Dkt.* 488.

Maharaj's consistent efforts to claim judicial protection of her federal rights are a matter of record. See the section of this Petition entitled "Opinions & Orders", pp. 3-6 hereinabove, as well as the Appendix herein, Appendices A-K.

---

[28] Maharaj presented extensive documentary evidence and a detailed chronology of the source and history of the IRA assets in the custody of Vanguard and Founders. For instance, on December 17, 1985, The Charter Company forwarded to Monga a Form 1099-R Statement for Recipients of total Distribution from Profit-Sharing, Retirement Plans, Individual Retirement Arrangements, ... confirming the distribution of $36,823.66 to Monga for the year 1985.(Exhibits 14 and 15). The notice also advised that as a 'qualifying total distribution' Monga could make a tax-free rollover of the funds into a new or existing IRA. (Exhibit 16). On about May 1986 Monga rolled over these retirement funds to the Scudder IRA. Maharaj cited page 8 of Ottenberg's own February 17, 1995 Memorandum in the Superior Court (*Dkt.* 294): where Ottenberg explains:

> The act of transferring funds from one IRA account to another is not a distribution of funds for tax purposes nor does it destroy the tax-exempt status under Federal, Missouri, Pennsylvania or Massachusetts law. Under Federal law, an individual retirement account pursuant to Section 408 of the Internal Revenue Code may be rolled over into a new individual retirement account or individual retirement annuity without being treated as a distribution for tax purposes, so long as the entire amount received is paid into a new account within 60 days of the distribution from the original account." 26 U.S.C. Section 108(d)(3)(A)(i).

Appellants' Massachusetts Appeals Court Brief in No. 2004-P-0591 (*Appls Ct Dkt* 9) shows:

> The second issue asked, "Whether Individual Retirement Accounts ("IRAs") and Profit Sharing retirement savings are protected from seizure by judgment creditors under *Patterson v. Shumate*, 504 U.S. 753 (1992), 26 U.S.C. §408, 29 U.S.C. §1001 *et seq.*, and M.G.L.c. 235, §34A."
>
> The seventh issue asked "Whether the order enjoining appellants from litigation in other jurisdictions violates *Donovan v. Dallas*, 377 U.S. 408 (1964)."
>
> The eigth issue asked whether IRA funds could be used to pay attorneys fees to IRA trustees.
>
> Point 2 of the argument summary asserts, "The Court's orders and judgment authorizing the receiver to seize Monga's exempt retirement funds to satisfy Sommer's judgment are in conflict with 26 U.S.C. 408, 29 U.S.C. 1001, et. seq., the Supremacy Clause, U.S. Supreme Court decisions protecting retirement funds, the decisions of ten Federal Courts, State Exemption Statutes, and Monga's retirement fund written Agreements, all of which protect said assets from creditors' claims"
>
> Point 5 of the argument summary asserts, "The Court below erred in enjoining Maharaj from litigation in federal court outside Massachusetts, pp. 41-43, and in awarding attorney fees of $92,000 to Vanguard and IFTC, pp. 43-45, and $60,000 to Sommer's attorney, pp. 46-47."

These points were elaborated in Appellants' Brief in the Appeals Court, e.g. pp. 27, 29, 31 and 42. See also Appellants' Reply Brief, dated February 28, 2005, (*App.infra* 91-110), the Appeals Court argument on October 14, 2005 and Appellants' March 20, 2006 Petition for Rehearing. (*App.infra* 77-89)

On March 3, 2006, the Appeals Court ruled on these issues by vacating the Superior Court's 1998 and 2000 orders authorizing the seizure and distribution of the IRA assets, 65 Mass.App.Ct. 657 (*App.infra* 55-75).

On further review to the Supreme Judicial Court, the case was presented on Appellants' Appeals Court Briefs. Maharaj's submitted a post-argument letter and a Motion for Rehearing which reasserted her federal claims. See *App.infra* 3-23, 39-54; see also *App.infra* 77-89, 91-110.

REASONS FOR GRANTING THE PETITION

There are several compelling reasons, within the letter and spirit of this Court's Rule 10, for granting Maharaj's petition for a writ of certiorari.

The issues involved reach constitutional dimensions, *Rice v. Sioux City Memorial Park Cemetery*, 349, U.S. 70 (1955); it raises important questions relating to the administration and enforcement of federal laws concerning individual retirement accounts, which have given rise to numerous conflicting decisions in federal, bankruptcy and state courts. *Donaldson v. U.S.*, 400 U.S. 516 (1971); the principles at issue are

of pubic importance, not only because of the confusion resulting from jurisprudential conflict, but also because of the role IRAs play in this nation in these times of financial insecurity; it may be viewed as presenting important novel questions as to the interplay of federal and state laws (substantive and procedural) concerning IRAs which should be settled by this Court, *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); last, but not least, it involves a state court decision which conflicts with several relevant decisions of this Court. In the interest of conciseness, prescribed by this Court's Rule 14(h), the structure adopted below focuses mainly on the latter conflicts.

A few prefatory words seem appropriate, for the sake of context, on the importance of IRAs in our nation's economy today. Here are some excerpts from Craig Copeland, "IRA Assets, Contributions, and Market Share"[29]:

> ... IRAs account for a sizable portion of the assets held by Americans in tax-preferred plans designed for retirement, surpassing the assets held in either private-sector defined contribution (DC) plans (typically 401(k)-type plans) or defined benefit (DB) plans (traditional pensions). Furthermore, IRA assets have continued to grow in importance and are likely to become the single largest source of retirement assets outside of Social Security for private-sector workers in retirement. ...
>
> ...

---

[29] EBRI Notes • January 2007 • Vol. 28, No. 1, SSRN-id959015. See also Investment Company Institute, "The U.S. Retirement Market, 2005," *Research Fundamentals*, Vol. 15, No. 5 (Investment Company Institute, July 2006).

> ...In 2005, the [IRA] assets again increased to a new high of $3.67 trillion....
>
> ...
>
> Of the $2.5 trillion in IRAs in 2002, $2.3 trillion were in traditional IRAs (Figure 6).[6] This represents more than 90 percent of the IRA assets (Figure 7). Roth IRAs amounted to $77.6 billion, and all other IRAs held $133.4 billion in 2002.[7]
>
> ...
>
> This growth in IRAs is being fueled by rollovers from employment-based tax-qualified retirement plans, which amount to approximately $200 billion annually. ... [30]

There are good reasons why this Court should revisit a topic it has addressed in each of the last three decades. What was done to Maharaj could be done to anyone seeking a measure of financial security under the federal umbrella Congress enacted. Millions of people have placed their trust in IRAs. The potential harm of allowing the Supreme Judicial Court's decision to stand is incalculable.

---

[30] As Hon. William Houston Brown, Lawrence Ahern III explains in his commentary on the BAPCPA amendments to the bankruptcy code, "The $1 million limit on the debtor's exemption for IRAs is in addition to rollovers from other kinds of more favored retirement plans....Congress made this broad policy in favor of retirement plans clear...." Part I. Commentary on Amended Code, Chapter 8. Exemptions, Exclusions, and Asset Protection § 8:6. See also GAO June 2008 Report on IRAs to the House Ways & Means Committee, GAO-08-590, and Holden, Ireland, Leonard-Chambers & Bogdan, "The Individual Retirement Account at Age 30: A Retrospective," Investment Company Institute, Vol. 11/No. 1 (February 2005).

A. Degen[31]

Among the troubling aspects of the SJC 2008 Opinion is its apparent disdain of this Court's jurisprudence, as well as of other members of the Massachusetts judiciary who honor this Court's role as ultimate interpreter of what the law of the land means for purposes of the Supremacy Cause. *Degen* played a key role in the Appeals Court's 2006 decision, yet the SJC ignored it, all the more surprisingly given its emphasis, both during the oral argument as well as in its Opinion, on Monga's failure to surrender on the *capias* issued in 1992 concerning the default contempt.

Bearing in mind the striking similarity between the instant case and *Degen*, (both involve the judiciary's inherent powers in a property forfeiture case), the SJC read must certainly have this Court's analysis of what Due Process requires: "...[ordinarily] a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause...," 517 U.S. at 823. Exceptionally, a fugitive may lose the right to seek judicial relief, for instance the statutory right to appellate review, *Id. Degen* jeld that the "fugitive disentitlement doctrine" could not be judicially extended by applying it to a fugitive in a related criminal prosecution. Emphasizing the dangers of overreaching when one branch of government undertakes to define its own authority, this Court held that "inherent powers" did not permit the judiciary to assume powers reserved for the legislative branch. Appropriately, Congress

[31] *Degen v. United States*, 517 U.S. 820 (1996) ("*Degen*").

responded by enacting 28 U.S.C. § 2466, which provides that a person who flees in order to avoid a criminal prosecution may be barred from litigating a claim in a related forfeiture action.

Congress' limited response to *Degen* underscores the breathtaking leap the SJC took in its 2008 Opinion. The SJC, as did the Superior Court in 1998, relied on nothing more than judicial inherent powers in stripping Maharaj of her right to be heard. To grasp the reach of what occurred, one needs to appreciate the fact that Maharaj had filed documents, motions, affidavits, pleadings, that these papers were not stricken from the record. These documents were simply ignored, burying the inconvenient truth they revealed, that the IRAs were valid.

As for Monga, he had already been punished for his default contempt, and a $100,000 penalty had been imposed. Nor was he a fugitive in 1998. Indeed, had Monga survived beyond 1996, the Appeals Court might have reversed the Superior Court's refusal to set aside the default contempt. Those possibilities remain unknowable having died along with Monga in 1996. To add insult to injury, the Superior Court declared posthumously that Monga had forfeited his IRAs. Apart from the distaste universally expressed against visiting the dead with wrongs which cannot be righted from the grave,[32] the idea of Due Process surely includes expectations of judicial decency and respect for law which seems to be entirely absent in what the Superior Court assumed the power to do.

---

[32] See This argument, particularly respecting this Court's jurisprudence, is more fully developed in Maharaj's SJC Petition for Rehearing. (*App Infra* 19-20).

What occurred in 1998 is a dire warning that this Court should vigilantly control judicial overreaching, on pain of losing the legitimacy upon which the judicial process depends in a democracy.[33]

B. Guidry, Patterson, Rousey[34]

Beyond forfeiture of the Due Process right to be heard, this case illustrates how the denial of procedural rights so easily translates into a deprivation of substantive property rights. Among the more prominent of this Court's decisions concerning retirement benefits are *Guidy*, *Patterson*, and *Rousey*.[35]

It seems shocking that the SJC felt it unnecessary to acknowledge this Court's jurisprudence, particularly *Guidry* which so recently affirmed that *Patterson*'s scope includes IRAs. Both *Guidy* and *Patterson* involved 11 U.S.C. § 522(d)(10)(E), under which, "...a debtor who elects the federal exemptions set forth in § 522(d) may exempt from the bankruptcy estate...," *Patterson*, 504 U.S. at 761. *Patterson* held that the phrase "applicable nonbankruptcy law" reflected Congressional intent to include federal law, *Ibid.* at 760. Emphasizing its unwillingness, "...to recognize any implied exceptions to the broad statutory

---

[33] This argument, particularly respecting this Court's jurisprudence, is more fully developed in Maharaj's SJC Petition for Rehearing, (*App.Infra* 11-18).

[34] Respectively, *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) ("*Guidry*"), *Patterson v. Shumate*, 504 U.S. 753 (1992) ("*Patterson*"), and *Rousey v. Jacoway*, 544 U.S. 320 (2005) ("*Rousey*")

[35] This Argument is more fully developed in Maharaj's SJC Petition for Rehearing, (*App.Infra* 5-11)

scheme...," (citing *Guidy*), *id.*, *Patterson* reaffirms this Court's determination vigorously to enforce federal laws protecting retirement benefits.

Given Maharaj's explicit reliance on those decisions, the SJC's silence regarding *Guidry*, *Patterson* and *Rousey*, as well as *Degen*, treats them as irrelevant to the Superior Court's forfeiture "exception to the broad statutory scheme" created under the banner of inherent powers. Such silence bears eloquent testimony that the SJC inherent powers rationale is inconsistent with *Guidry*, *Patterson* and *Rousey*, as well as *Degen*.

The SJC 2008 Opinion, if allowed to stand, would raise the question whether state receivership laws are preempted by the federal bankruptcy code where IRAs are concerned. A negative answer to that question would create a huge hole in the protective armor Congress designed to shield IRAs. Maharaj submits, as the IRA Trustees insisted within the structure of a Massachusetts' receivership, that absent evidence of fraudulent transfers IRAs are beyond the reach of judgment creditors.

There is today an acute need for this Court to define the protected boundaries of IRAs rights. The frenzy of lower court decisions over the last two decades, particularly in bankruptcy proceedings, illustrate the vulnerability of owners' rights in IRAs. A bare glance at the annotations conjures images of shark feeding. Little imagination is needed to anticipate what likely will occur in the dim economic prospects for our nation over the next few years. The SJC 2008 Opinion is a casebook lesson, an invitation for

creditors, their lawyers and receivers, to invent doctrines meant to circumvent Congressional will.

C. IRA Tustees' Legal Fees

The 1998 and 2000 Superior Court orders granting the IRA Trustees costs and attorney fees to be paid from the IRAs violates 26 U.S.C. § 408. To qualify, an IRA must be "nonforfeitable". The IRA contracts do not say authorize such extravagant disbursements. *Appls.Ct.& SJC App.* 999K-999X. Any clause purporting to dos so would violate section 408's nonforfeitability clause. The SJC's and the Appeals Court's decisions affirming the Superior Court's 1998 and 2000 orders to pay the IRA Trustees extravagant attorney fees from the IRAs is another form of forfeiture. If $100,000 can be spent by the IRA Trustees, why not $1 million - the owner lose her IRA, and be liable for any deficiency to her IRA Trustees? American doctrine against the payment of attorney fees has deep roots. The SJC 2008 Opinion and the Appeals Court 2006 Decision violate federal law.[36]

CONCLUSION

For the above-stated reasons, more cryptic than intended,[37] Maharaj prays this Honorable Court to grant the instant Petition for a Writ of Certiorari.

---

[36] This argument was fully developed in Maharaj's Appeals Court Petition for Rehearing. (*App Infra* 79-83

[37] The constraints imposed by this Court's 9000 word limit rule are unavoidable, given this Court's caseload. The challenge here was to create a thumbnail sketch of a case with 20 years of history. This would have been a very different petition had it

Respectfully submitted,

John G.S. Flym
85 Bd Suchet
75016 Paris
France
MA BBO # 172180
j.flym@neu.edu
(+33) 6 16 18 89 98

February 5, 2009

---

focused on the law. For instance, the weakness of the precedents relied upon by the SJC, or other jurisprudential aspects relevant to the issues this case raises, such as the impact of lawyer's fees being accorded to the IRA Trustees. Several other examples could be adduced. Hopefully this will turn out to have been phase one, establishing the nature of Maharaj's federal claims and their factual predicate. Hopefully this Court will accord us a phase two, with an opportunity to focus on the law.